CONFERENCE ON EUROPEAN RESTRUCTURING AND INSOLVENCY LAW

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Date: 25 May 2022
Re: CERIL Report 2022-1

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CERIL Report 2022-1

on Confidentiality, Secrecy and Privilege – The Position of the Insolvent Debtor

[1] This Report is prepared by CERIL Working Party (WP) 13 on Confidentiality, Secrecy and Privilege. The WP that discussed and contributed to this Report consisted, in addition to Reporters, of the conferees participating in this WP. The reporters would like to express their gratitude for their extensive contributions to Gert-Jan Boon (Netherlands), Pavel Boulatov (Russia), Prof. Stephan Madaus (Germany), Grégory Minne (Luxembourg), Prof. Elina Moustaira (Greece), Siv Sandvik (Norway), the Hon Lady Wolffe (Scotland), as well as two observers, American College of Bankruptcy Fellows Victor Vilaplana (Practus LLP, the United States) and Prof. Jack Williams (Georgia State University, the United States).

The Reporters also express their sincere gratitude to Research Associate Dr. Shuai Guo, China University of Political Science and Law, for the preparation of a preliminary study and the assistance with drafting the text of this report, and our assistants Ms Defne Tasman, University of Antwerp, and Ms Yuchen Zhang.

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1 INTRODUCTION

In early 2020, the Conference on European Restructuring and Insolvency Law (CERIL) jointly initiated a project with the International Insolvency Institute (III) on confidentiality, secrecy and privilege in corporate insolvency and bank resolution. This project resulted in a book with the same title *Confidentiality, Secrecy and Privilege in Corporate Insolvency and Bank Resolution* (The Hague: Eleven International Publishing, 2020).[2] In this legal area, this book is the first scholarly work. It describes situations regarding confidentiality, secrecy and privilege of information that different stakeholders may encounter, including debtors, insolvency practitioners, courts and insolvency authorities, creditors, banks, resolution authorities, etc.

The current Working Party 13 of CERIL is established by the CERIL Executive following this previous work. The Working Party aims to provide a thorough analysis on confidentiality, secrecy and privilege matters in circumstances where the EU Restructuring Directive 2019/1023 ('EU Restructuring Directive) applies.[3]

In general, information plays a core role in a corporate insolvency process. The Working Party firstly distinguished disclosure of information of the insolvent debtor and its business to the general public vis-à-vis disclosure to creditors. Disclosure to the general public often concerns constitutional rights and is prescribed under national laws. As a matter of fact, different states may take opposite views towards this matter. For example, in Mexico, the general public does not have access to court files, only parties with an economic interest. By contrast, in the US, which is at the other extreme, the presumption is to disclose court files unless a party objects and gets a court order stating that disclosure is not required. This report does not address this topic of information at large (sometimes related to statutory rules for information to be available for the general public). It limits the discussion regarding information concerning the debtor and its business being available for its creditors. Access and availability of relevant information is a vital requirement for an efficient corporate restructuring process, making it essential that all those who are involved in this process can act or decide on the basis of optimal information becoming available to them as freely and rapidly as is reasonably practicable. Yet, this information is not available for them due to statutory or contractual rules regarding confidentiality, secrecy and privilege of information. The Report therefore focusses on information within the field of insolvency law, placing its focus on transparency of information towards everyone who has an economic interest in a case and in an application for restructuring.

The present report of WP 13 focuses on the position of debtors.[4] The preliminary investigatory study mentioned above described several circumstances where debtors may encounter confidentiality, secrecy and privilege issues in insolvency proceedings.[5] A most

[2] Bob Wessels and Shuai Guo, *Confidentiality, Secrecy and Privilege in Corporate Insolvency and Bank Resolution*, The Hague: Eleven International Publishing, 2020.

[3] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172/18. Additional thoughts may be given to confidentiality, secrecy and data protection matters concerning the increasing application of new technologies such as blockchain and AI. See Debra Grassgreen and Scott Atkins, 'The Use of Mediation to Improve Global Restructuring Outcomes in a Post-Pandemic World', Global Restructuring Review, 10 September 2021.

[4] This report is the first one of WP 13's project on confidentiality, secrecy and privilege matters in relation to the EU Restructuring Directive. The other two project will focus on insolvency practitioners, courts and other insolvency authorities.

[5] Wessels and Guo, 2020, p. 31-46.

outstanding conflict in such proceedings is a debtor's duty of disclosure, which is in principle for the benefit of all creditors and for the smooth administration by insolvency practitioners, vis-à-vis a debtor's privilege of keeping certain information confidential, such as trade secrets, confidential research or commercial information. This report draws conclusions by assessing a selection of European countries and proposes recommendations for national legislators for consideration when implementing the EU Restructuring Directive or amending already existing legislation regarding corporate restructuring.[6] For clarification, debtors in this report only refer to corporate debtors not being banks and other financial institutions.[7] This report is based on information available to the Working Party on February 1, 2022.

2 THE EU RESTRUCTURING DIRECTIVE

The EU Restructuring Directive is '… to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restricting, insolvency, discharge of debt, and disqualifications'.[8] In particular, the Directive aims to ensure that (i) 'viable enterprise and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating', that (ii) 'honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance', and that 'the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length'.[9]

This EU Restructuring Directive lays down rules on: (a) 'preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor'; (b) 'procedures leading to a discharge of debt incurred by insolvent entrepreneurs'; and (c) 'measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt'.[10] Preventive restructuring proceedings apply when there is only a likelihood of insolvency, with a view to 'preventing insolvency and ensuring their viability'.[11] The determination of 'likelihood of insolvency' is left for national laws to prescribe.[12] In preventive restructuring proceedings, debtors would 'remain totally, or at least partially, in control of their assets and the day-to-day operation of their business'.[13] It is common knowledge that these procedures share many similarities with Chapter 11 of the US

[6] It is acknowledged that in most Member States the law of insolvency regarding confidentiality or secrecy will have relations in or have ramifications in applicable rules of civil law, laws regulating persons and legal persons, the regulation of the public status of citizens (constitutional law) or social security laws. These topics have not particularly been addressed in this Report.

[7] Article 1(2) EU Restructuring Directive.

[8] Recital (1) EU Restructuring Directive.

[9] Recital (1) EU Restructuring Directive.

[10] Article 1(1) EU Restructuring Directive.

[11] Article 4(1) EU Restructuring Directive.

[12] Article 2(2)(b) EU Restructuring Directive.

[13] Article 5(1) EU Restructuring Directive.

Bankruptcy Code, in particular, the introduction of the concepts of debtor in possession (DIP), automatic stay and cross-class cramdown.[14]

Since it is a Directive, this EU Restructuring Directive needs to be transposed into national laws. In the course of 2021 several EU Member States have adopted or enacted legislation implementing (parts) of EU Restructuring Directive. However, a majority of EU Member States have encountered particular difficulties in implementing the Directive. They have been granted an extension of one year, therefore until 17 July 2022, see Article 34(2) EU Restructuring Directive.[15]

3 DEBTOR'S DUTY OF DISCLOSURE AND ITS EXCEPTIONS

3.1 Debtor's duty of disclosure

When entering insolvency proceedings, a debtor is often burdened with the obligation to disclose information 'in order to receive the full benefits and protections of the Bankruptcy Code, with the broad policy and goals of the Code "favor[ing] transparency and disclosure whenever possible"'.[16] The duty of disclosure is considered to be 'at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge'.[17] The information relates to all (global) income, profit and assets of the debtor without any territorial limitation, unless national law so provides.[18]

Disclosure is of prime importance, for several reasons. First, creditors rely on debtors' disclosure to plan their actions, for example, giving consent to a no asset discharge in a liquidation proceeding or voting in favour of a reorganisation plan.[19] Second, (bankruptcy) courts also rely on the information provided by debtors for the approval of liquidation or reorganisation plans.[20] In addition, a swift and efficient process also relies on full disclosure from debtors to avoid 'the necessity of digging out and conducting independent

[14] See. e.g. Nicolaes W.A. Tollenaar, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings', *Insolvency Intelligence*, Vol. 30, No. 5, 2017, p. 65-81; David C. Ehmke, Jennifer L.L. Gant, Gert-Jan Boon, L. Langkjaer, Emilie Ghio, 'The European Union Preventive Restructuring Framework: A Hole in One?', *International Insolvency Review*, Vol. 28, No. 2, 2019, p. 184-209; Daoning Zhang, 'Preventive Restructuring Frameworks: A Possible Solution for Financially Distressed Multinational Corporate Groups in the EU', *European Business Organization Law Review*, Vol 20., No. 2, 2019, p. 285-318.

[15] In Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B (O.J. L 455/4) eight EU Member States have introduced of amended insolvency proceedings as a result of implementing the Directive. This Regulation entered into force on 9 January 2022.

[16] *In re McDowell*, 483 B.R. 471, 477 (Bankr. S.D. Tex. 2012) (citing *Browning Mfg. v. Mims* (*In re Coastal Plains, Inc.*), 179 F.3d 197, 208 (5th Cir. 1999)).

[17] *Lewis v. Weyerhaeuser Co.*, 141 F. App'x 420, 424 (6th Cir. 2005) (citing *In re Colvin*, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003)). See also *Oneida Motor Freight, Inc. v. New Jersey Bank*, 848 F.2d 414, 417 (3rd Cir. 1988) ('A long-standing tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, for the benefit of creditors, all his interests and property rights').

[18] National law may also contain restrictions based on privacy legislation. As an example, Article 79(6) of the Greek Act 'Debt Settlement & Facilitation of a Second Chance', Law 4738/2020 as amended by Law 4818/2021 provides that as regards required information existing in data bases of the Public sector or financial institutions, the application contains a consent for accessing such information to any person having legitimate interest as well as consent for the lifting of confidentiality of the bank deposits of article 1 of legislative decree 1059/1971 (A' 270) and of tax secrecy. The debtor provides the same access consent for the submitted accompanying documents to every person with a legitimate interest (Unofficial translation, kindly provided by Yiannis Bazinas, see: www.bazinas.com/media/616d81aae21c4.pdf). See also Recommendation 2.

[19] *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002).

[20] *Ibid.*

examinations to get the facts'.[21] In the Netherlands, the Law amending the Code of Civil Procedure and the Bankruptcy Act in connection with the revision of attachment and execution act (*Wet herziening beslag- en executierecht*) entered into force on 1 October 2020. Accordingly, debtors are burdened with the obligation to disclose their bank accounts, although without particular sanctions for non-compliance. Similarly, there are parallel provisions in some other European countries, such as Spain and Greece. It is, however, also noted that in some other EU Member States, there is no concrete rule on this duty of disclosure.

Under the US Bankruptcy Code, a debtor in possession bears such a duty.[22] For example, the debtor in possession must file a list of creditors, a schedule of assets and liabilities, a statement of financial affairs, income tax statements, and other basic financial information.[23] Also, a debtor in possession needs to satisfy certain duties of the bankruptcy trustee (once appointed), such as 'furnish[ing] such information concerning the estate and the estate's administration as is required by a party in interest'.[24] For a business in full operation, the debtor in possession must 'file with the court … periodic reports and summaries of the operation of such business, including a statement of receipts and disbursement, and such other information as the United States trustee or the court requires'.[25]

Also, in Russia such a duty exits. In Russia, a debtor needs to disclose information about its assets and bank accounts. It must also file a list of creditors and the balance sheet value of all assets.[26]

In the EU preventive restructuring proceedings, debtors can retain their own business and operation (and act as a 'debtor in possession'), but still need to bear such a duty of disclosure for creditors and courts to allow the latter to make an informed decision. To adopt or approve a restructuring plan, a debtor needs to disclose in its restructuring plans 'assets and liabilities at the time of submission of the restructuring plan, including a value for assets, a description of the economic situation of the debtor and the position of workers, and a description of the causes and the extent of the difficulties of the debtor', and 'the affected parties, whether named individually or described by categories of debt in accordance with national law, as well as their claims or interests covered by the restricting plans' (the status of creditors), as well as groups or different classes of creditors or parties not affected by the restructuring plans.[27] In addition, the debtor needs to disclose terms of the restructuring plan, including (i) 'any proposed restructuring measures'; (ii) 'where applicable, the

[21] *Mertz v. Rott*, 955 F.2d 596, 598 (8th Cir. 1992) (citing *In re Mascolo*, 505 F.2d 274, 278 (1st Cir. 1974)) ("The successful functioning of the bankruptcy act hinges both upon the bankrupt's veracity and his willingness to make a full disclosure."). See also, e.g. Brad B. Erens and Kelly M. Neff, 'Confidentiality in Chapter 11', *Emory Bankruptcy Developments Journal*, Vol. 22., No. 1, 2005, p. 47-94; Alexander Wu, 'Motivating Disclosure by a Debtor in Bankruptcy, The Bankruptcy Code, Intellectual Property, and Fiduciary Duties', *Yale Journal on Regulation*, Vol. 26, No. 2, 2009, p. 481-510.

[22] See, e.g. *Wolf v. Weinstein*, 372 U.S. 633, 649 (1963) (a DIP 'bears essentially the same fiduciary obligation to the creditors as does the trustee for the Debtor out of possession'). See also *Brent Explorations, Inc. v. Karst Enterprises, Inc.* (*In re Brent Explorations, Inc.*), 31 B.R. 745, 752 (Bankr. D. Colo. 1983); *Kremen v. Harford Mut. Ins. Co.* (*In re J.T.R. Corp.*), 985 F. 2d 602, 605 (4th Cir. 1992); *Bowers v. Atlanta Motor Speedway, Inc.* (*In re Se. Hotel Props. Ltd. P'ship*), 99 F.3d 151, 152 (4th Cir. 1996); *Official Comm. Of Unsecured Creditors of United Healthcare Sys., Inc. v. United Healthcare Sys., Inc.* (*In re United Healthcare Sys., Inc.*), 200 F.3d 170, 177 (3d Cir. 1999); *Dunes Hotel Assocs. V. Hyatt Corp.*, 245 B.R. 492, 506 (D.S.C. 2000).

[23] 11 USC §§521, 1107.

[24] 11 USC §§704(a)(7), 1106, 1107.

[25] 11 USC §§704(a)(8), 1106, 1107.

[26] Articles 37, 38 and 47 of Federal Law of the Russian Federation No. 127-FZ dated 26 October 2002 "On Insolvency (Bankruptcy)" (the "Russian Insolvency Law").

[27] Article 8(1)(b)-(e) EU Restructuring Directive

proposed duration of any proposed restructuring measures'; (iii) 'the arrangements with regard to informing and consulting the employee's representatives'; (iv) 'overall consequences as regards employment such as dismissals, short-time working arrangements or similar'; (v) 'the estimated financial flows of the debtor'; and (vi) 'any new financing anticipated as part of the restructuring plan, and the reasons why the new financing is necessary to implement that plan'.[28] The debtor also needs to provide 'a statement of reasons which explains why the restructuring plan has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business, including the necessary pre-conditions for the success of the plan.'[29] Based on the information provided, creditors and authorities can make a fair evaluation of their positions, so that such disclosure is essential for creditors to adopt restructuring plans[30] or for authorities to confirm restructuring plans.[31]

In a recent Dutch case, the court decided not to sanction the schemes proposed by the debtor on the basis of insufficient disclosure. The reason is specified as insufficient information about new finance. The opposing creditors maintained that they lack the information about the new financier, which provides EUR 1 million financing and promised another EUR 2 million, but had not been classified properly and had unfairly influenced the outcome of the creditors' vote. The court ruled in favour of opposing creditors, in particular, a violation of the Article 375(1) Dutch Bankruptcy Code, where debtors had failed to provide any insight regarding the creditor's position prior to and after the conclusion of the agreement.[32]

There is another proceeding prescribed in the EU Restructuring Directive, that is, discharge of debt. Consequently, 'honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance'.[33] In the process of discharge of debt, debtors also have certain information obligations.[34] The Directive does not specify what the information obligations are.

Under both circumstances, debtors bear the duty of disclosure for the smooth administrative of preventive restructuring proceedings. In particular when submitting a restructuring plan, a debtor needs to disclose information according to the list prescribed in the Directive. However, it may be questionable whether such disclosure in sufficient, especially for creditors to approve the plan. For instance, should a debtor disclose its business strategies in order for its creditors to assess the feasibility of the restructuring plan? Should these business strategies be included in the statement of the restructuring plan? This issue is not clearly prescribed in the Directive and therefor left for national laws. For the time being, it is found necessary to ensure that debtors in all EU Member States should have a general duty of disclosure.

The Working Party discussed the ratio and scope of such a duty of disclosure. First, it distinguishes the decisive moment of disclosure at a specific reference time. Disclosure relates to the time of the date the request for a preventive restructuring proceeding is made vis-à-vis disclosure before the decisive day for the vote on the restructuring plan, which evidently is a later moment. For instance, the US clearly makes this distinction. In particular,

[28] Article 8(1)(g) EU Restructuring Directive.

[29] Article 8(1)(h) EU Restructuring Directive

[30] Article 9 EU Restructuring Directive.

[31] Article 10 EU Restructuring Directive.

[32] Central Netherlands District Court 11 October 2021, ECLI:NL:RBMNE:2021:5531.

[33] Recital (1) EU Restructuring Directive.

[34] Article 23(2)(b) and (d) EU Restructuring Directive.

Section 1125 of the US Bankruptcy Code prescribes 'postpetition disclosure and solicitation' and stipulates that disclosure should be made to hypothetical investors typical of the holders of claims or interests of the relevant class, that is, creditors and other stakeholders, for them to 'make an informed judgment about the plan'.[35] Disclosure at different stages may include different information. Disclosure at the time of filing for a restructuring request mainly concerns information concerning the financial and operational status of the debtor, while disclosure relevant to a (voting process concerning a) restructuring plan needs additional information concerning the feasibility and enforceability of the plan.

The Working Party also found that, in order to examine to what extent a debtor should disclose its information, an analogy can be made to insurance contracts, which apply the *uberrima fides* or utmost good faith rule.[36] As an English law tradition developed from the case *Carter v. Boehm,* an insured bears the duty to disclose all material facts to the insurer on its own initiative.[37] In the following decades, in case law, the application of uberrima fides has been broadened to every material fact regardless of whether the insured finds it material or not.[38] The reason for imposing such a duty of uberrima fides on insured parties is to enable the insurer to form a rational decision whether to accept the risk and what premium is charged.[39] In fact, in insurance contracts, both parties bear such a duty, and for insurers, specific requirements include paying a claim within a reasonable time and proper explanation of the insurance policy and terms.[40]

Similarly, in preventive restructuring proceedings, when creditors need to determine whether to accept or approve a restructuring plan, they need all material facts regarding the debtor and its business to make an informed decision on whether a restructuring plan is feasible. The debtor therefore may be said to bear the duty to disclose all relevant information, which may be under the category of the duty of uberrima fides.

It cannot be overlooked that in insurance contacts, insurers are the ones with all the expertise in determining insurance policies and premiums, by contrast, the insured parties are normally consumers with less sophisticated knowledge about the insurance industry. Therefore, the insured parties do not bear the consequences if the insurer makes no inquiry as to the fact in question.[41] However, in preventive restructuring proceedings, usually both debtors and creditors are not restructuring experts. If a debtor omits some information during the process, it cannot instantly be concluded that it violates the duty of uberrima fides, unless it intentionally conceals information upon the requests of creditors, practitioners or courts. It is therefore suggested that the debtor's general obligation to provide information concerns information that the debtor knows or should understand to be important for the effective implementation of any restructuring at issue. In general, a restructuring offers the debtor who has ended up in an insolvency situation or where its insolvency is immanent, the opportunity to continue his business, albeit in a slimmed-down

[35] 11 USS §1125.

[36] Lauren Wright, 'Utmost Good Faith and Fairness in Life Insurance: Restoring Consumer Confidence' (February 6, 2017). UNSWLJ Student Series No. 17-03, available at SSRN: https://ssrn.com/abstract=2919187.

[37] Carter v. Boehm (1766) 3 Burr 1905.

[38] Lindenau v. Desborough, 108 Eng Rep 1160 (KB 1828); Bates v. Hewitt (1867) L.R. 2 Q.B. 595. See a historical development of uberrima fides, Francis Achampong, 'Uberrima Fides in English and American Insurance Law: A Comparative Analysis', International and Comparative Law Quarterly, Vol. 36, 1987, p. 329-347.

[39] Achampong, 1987, p. 329.

[40] Catherine Larkin, 'Uberrima Fides – Quo Vadis – Where to from Here', Bond Law Review, Vol. 7, No. 2, 1995, p. [i]-43.

[41] Blair v. National Security Insurance Co., 126 F.2d 955 (3d Cir. 1942); Stecker v. American Home Fire Assurance Co., 299 N.Y.1 (1949).

form. However, this must be counterbalanced by the fact that the debtor must make the greatest possible contribution and effort to provide relevant data and information.[42]

Recommendation 1

1.1 Subject to Recommendation 2 (confidentiality) and Recommendations 3 and 4 (affected and non-affected creditors) a debtor should be required to bear a general duty to disclose information to creditors in preventive restructuring proceedings.

1.2 The purpose of the duty to disclose is to make available all facts relevant to the assessment of a preventive restructuring request as well as a preventive restructuring plan, to allow anyone addressed (such as a court or creditors) to make an informed judgment.

1.3 The duty to disclose concerns the provision of information that the debtor knows or should understand to be important for the effective implementation of any preventive restructuring at issue.

1.4 The duty to disclose rests on the debtor itself and is realised on the debtor's own initiative. Within the specifics of a Member State's available restructuring proceedings, the duty to disclose includes the duty to actively keep the information up to date during the full process, including the process towards an approved and confirmed preventive restructuring plan.

1.5 Not complying with the duty to disclose by the debtor will generally result in the creditors' voting against a proposed plan and/or a court withholding its confirmation of the plan and/or any specific sanctions in a national insolvency law or criminal law. EU Member States should enact or amend an appropriate sanction-system in their laws.

3.2 Exceptions

A concern to be addressed in the disclosure (and therefore sharing) of information is the wish that certain sensitive information remains confidential. Therefore, consideration should be given to ensuring that certain information of a sensitive nature, whether from the aspect of public, private or commercial sensitivity (such as information regarding financial amounts, login codes, security measures, certain public or fiscal data, identifiable names of certain persons, GDPR protected information, etc.) is shared in such ways that this information will not be accessible for parties that do not have an interest in it. Even though under most circumstances, insolvency and restructuring proceedings require transparency, there are special conditions under which debtors' information needs to be protected and cannot be disclosed.[43]

First, personal-identifiable information should be protected for the purpose of protecting the privacy of individuals. The US Bankruptcy Code protects minor children by allowing a non-public record keeping track of the name of minor children.[44] Also, the US Federal Rules of Bankruptcy Procedure require only the filing of 'the last four digits of the social-security

[42] In a situation in which the parties involved do not expressly request information, the debtor is obliged, in connection with what he reasonably knew or should have known about the nature of the questions put to him, to provide information that would be of interest to the inquirer.

[43] Wessels and Guo, 2020, p. 46. The Report does not address the question whether a debtor in preventive restructuring proceeding or creditors being a party to a preventive restructuring plan should disclose or not that the debtor finds itself in a specific financial position. Non-disclosure seems rather obvious, but any rule on this topic should be considered by national law or to be decided by the negotiating parties themselves.

[44] 11 USC §112.

number and taxpayer-identification number', 'the year of the individual's birth', 'the minor's initials', and the 'the last four digits of the financial-account number'.[45]

The EU Restructuring Directive does not provide specific provisions on this matter. The decision is up to specific national laws, in particular, provisions under national privacy and data protection laws. Similarly, in Russia, information related to medical information or pure personal information should not be disclosed.[46]

Second, certain business secrets need to be protected, especially for those of commercial value.[47] Section 107(b) of the US Bankruptcy Code prescribes that, upon the request of a party in interest, or a bankruptcy court's own motion, the bankruptcy court can order not to disclose: (i) 'a trade secret or confidential research, development, or commercial information'; or (ii) 'scandalous or defamatory matter'.[48]

EU Restructuring Directive does not specify relevant issues either. As illustrated in above Section 3.1, a question is raised about whether business strategies should be disclosed in the restructuring plans. Additional examples include customer information, contacts, or intellectual property-related rights. For instance, should the cookie-recipe of an insolvent cookie-company be disclosed under this duty or should the recipe be categorised as a 'business secret'? In particular, with the development of digital technology, 'data' becomes an increasingly important asset, and it often raises the questions whether certain data are commercially sensitive. Given the large number of different types of businesses, it is not without difficulties to formulate what is a 'business secret' in a single legal provision.

It may be useful to refer to the US mode, where judges are empowered to determine whether information submitted by an applicant should be kept from disclosure. This is particularly needed when creditors or other stakeholders require debtors-in-possession to disclose certain information not clearly prescribed in the laws. With respect to disclosure of confidential information, it is quite common in the US for the court on request of a party to allow 'sealing' of confidential information, at the moment of filing or during the conduct of the proceedings. Such a method aims to allow that only certain persons (the court and parties who need to see the information and have signed a confidentiality agreement) receive access to such information.

It is acknowledged that it may be difficult for judges from civil law jurisdictions to make such a decision without proper legal authorisation. Therefore, such a mechanism needs to be clearly stated in national laws.

The appeal mechanism prescribed in national laws should also be applicable, and this report does not interfere with such procedural or constitutional rights to appeal under each Member State's national laws. However, from the perspective of ensuring a swift and efficient process, this report recommends an appeal proceeding should not have an automatic suspension effect on preventive restructuring proceedings, provided interests of stakeholders are protected. An appeal to the court's decision on whether (or not) to grant

[45] US Federal Rules of Bankruptcy Procedures, Rule 9037 (Privacy protection for filing made with the Court).

[46] An insolvency administrator must maintain confidentiality of the information protected by law, such as personal information, trade secret, commercial information or information covered by bank-client privilege. An insolvency administrator's breach of this requirement is a ground for civil, administrative or criminal liability (Articles 20.3 (3) and 213.9 (10) of the Russian Insolvency Law). After the court introduces receivership, the information about the debtor's financial statement ceases to be confidential (Article 126 (1) of the Russian Insolvency Law).

[47] For instance, intellectual property. See Wu, 2009, p. 488.

[48] 11 USC §107(b). See also US Federal Rules of Bankruptcy Procedures, Rule 9018 (Secret, confidential, scandalous, or defamatory matter).

disclosure usually does not affect restructuring strategies exercised by debtors or restructuring experts. However, under certain circumstances, judges may rule that an appeal may lead to the suspension of a restructuring proceeding under special circumstances, for instance, when the information is necessary for creditors to approve or disapprove a restructuring plan.

Recommendation 2

2.1 In making available all facts relevant to the assessment of a preventive restructuring request, under certain circumstances, a debtor should be allowed to keep certain information confidential.

2.2 EU Member States should enact or amend an appropriate system for ensuring that certain information should remain confidential. Such a system could include 'sealing' of information.

2.3 EU Member States should lay down explicitly in their laws an option to submit any controversies whether certain information is confidential to a court to allow it to decide whether certain information should be disclosed.

2.4 To ensure swift and efficient proceedings, an appeal to (higher) courts against the court's decision should not have an automatic suspension effect on preventive restructuring proceedings.

4 CONFIDENTIALITY OF PREVENTIVE RESTRUCTURING PROCEEDINGS AND DISCLOSURE TO AFFECTED CREDITORS

Generally, insolvency proceedings are collective proceedings usually under the supervision of a court, the nature of which requires publicity so that stakeholders can join the proceedings on an equal basis. Especially in traditional liquidation proceedings, notice of insolvency is declared to the public. Preventive restructuring proceedings, however, may be different, in the sense that keeping a preventive restructuring proceeding confidential is preferred, because it gives debtors a breathing time without disclosing to the public about the problems they are experiencing, in order to avoid reputation risks.[49] Establishing a 'confidential' (or: 'private') preventive restructuring proceeding may, however, limit its cross-border effectiveness. In the EU, cross-border insolvency is regulated under the European Insolvency Regulation (EIR or EIR 2015).[50] Recital 13 of EU Restructuring Directive sets out that the Directive should be without prejudice to the scope of EIR 2015. It aims to be fully compatible with, and complementary to the EIR 2015, by requiring EU Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. The approach taken under the EIR 2015 allows EU Member States however to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A to that Regulation. Recital 13 sets out that EU Restructuring Directive does not require that procedures within its scope to fulfil all the conditions for notification under that Annex.

These features of preventive restructuring proceedings lead to the question of the consequences of 'confidential' restructuring proceedings on the debtor's duty to disclose. Empirical evidence has shown that efficient pre-insolvency frameworks play an important

[49] Wessels and Guo, 2020, p. 64-66.

[50] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141/19. It is a recast version of its predecessor Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1.

role in fostering a culture of early restructuring and second chances in EU Member States.[51] 'Confidential' preventive restructuring proceedings are akin to private 'work-outs', with the advantage of negotiating private/contractual arrangements even before a debtor's actual 'insolvency', but subject to the condition that a restructuring plan may need confirmation by a judicial or administrative authority.[52] However, the whole process does not have to be under full supervision of judicial or administrative authorities, which is different from formal restructuring proceedings.[53] Under most circumstances, the EU Restructuring Directive allows a 'debtor in possession' procedure where debtors can control their assets and the day-to-day operation of their business.[54] Practitioners can be appointed by a juridical or administrative authority to supervise the activity of a debtor or to partially take over control of a debtor's daily operation, but only when it is necessary and decided on a case-by-case basis.[55]

Normally during the first period where a debtor is negotiating contractual arrangements with (some of) its creditors, there is no need to disclose information to the public, including creditors not involved in the negotiations. This is the process similar to private work-outs where confidentiality is one of the main advantages, with less disruption to the debtor's daily business than formal insolvency proceedings.[56] However, such confidentiality does not mean that debtors can intentionally conceal information from their creditors. The Directive sets out the definition of 'affected parties', which include workers, (classes of) creditors and equity holders whose claims and interests are directly affected by the restructuring plan.[57] Even though a preventive restructuring proceeding is 'confidential', disclosure should still be made to creditors in the negotiating process whose interests will be affected by the restructuring plan.

A comparison can be made to arbitration and mediation proceedings, which are usually kept in confidence which makes these kind of proceedings appealing because parties do not want to disclose any information to the public.[58] The meaning of 'confidentiality' in this way is related to publicity to the general public. This is different from a preventive restructuring proceeding, in which confidentiality usually refers to the nature of a preventive restructuring proceeding (being 'confidential) and the general position of a debtor regarding disclosure towards his creditors.

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[51] Mihaela Carpus Carcea, Daria Ciriaci, Carlos Cuerpo Caballero, Dimitri Lorenzani and Peter Pontuch, 'The Economic Impact of Rescue and Recovery Frameworks in the EU', European Economy Discussion Paper 004, September 2015, available at https://ec.europa.eu/info/sites/default/files/dp004_en.pdf.

[52] Article 10 EU Restructuring Directive. Accordingly, confirmation is necessary by a judicial or administrative authority at least under the following circumstances: (a) restructuring plans affect the claims or interests of dissenting affected parties; (b) restructuring plans provide for new financing; (c) restructuring plans involve the loss of more than 25% of the workforce. See Lorenzo Stanghellini, Riz Mokal, Christoph G. Paulus and Ignacio Tirado (eds) *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law*, Milano: Walters Kluwer Italia, 2018, available at www.codire.eu/publications.

[53] Wai Yee Wan and Casey Watters, 'Mandatory Disclosure in Corporate Debt Restructuring via Schemes of Arrangement: A Comparative Approach', *International Insolvency Review,* Vol. 30. No. S1, p. S111-S131.

[54] Article 5(1) EU Restructuring Directive.

[55] Recital (30), Article 5(2) EU Restructuring Directive.

[56] Jose M. Garrido, *Out-of-Court Debt Restructuring*, Washington D,C.:World Bank, 2012, p. 10 and 13.

[57] Article 2(1)(2) EU Restructuring Directive.

[58] Kent L. Brown, 'Confidentiality in Mediation: Status and Implications', Journal of Dispute Resolution, Vol. 1991, No. 2, 1991, p. 307-334; Leon E. Trakman, 'Confidentiality in International Commercial Arbitration', *Arbitration International*, Vol. 18, No. 1, 2002, p. 1-18; Elza Reymond-Eniaeva, *Towards a Uniform Approach to Confidentiality of International Arbitration*, Springer, 2019.

Conditions and procedures for keeping a preventive restructuring plan confidential are prescribed in national laws. For instance, since 1 January 2021, the Dutch Bankruptcy Act (DBA) contains a new fourth chapter covering the WHOA, according to which, a restructuring plan may be proposed in either a 'confidential' or 'private' ('*besloten*') pre-insolvency plan procedure or a public pre-insolvency plan procedure,[59] but subject to the court's review.[60] For another instance, in Germany, preventive restructuring proceedings are non-publicby default. Court involvement proceedings are commenced without going public, yet the German law allows the choice of opting for a pubic court intervention. In any case, the involvement of a court means that the debtor must produce certain reports to the court and the parties involved pursuant to § 6, 14 StaRUG, which the debtor may not disclose in a workout.

The Working Party is conscious of the fact that the availability of private types of preventive restructuring proceeding under any national legal system may entice an opportunistic debtor to not fully disclose information or provide only partial or just selected information. To prevent such behaviour is the rationale of Recommendation 3.

Recommendation 3

3 Preventive restructuring proceedings may be kept confidential (or: 'private') between a debtor and its creditors. In compliance with Recommendation 1 such a debtor will still be required to bear a general duty to disclose information to affected creditors in such preventive restructuring proceedings.

5 DISCLOSURE AND NON-AFFECTED CREDITORS

Where under EU Restructuring Directive it is possible to establish preventive restructuring proceedings which do not affect all creditors, rather just a group of 'affected' creditors, the question is what the position is of those creditors who are not affected by a plan.

It is an accepted practice that under certain circumstances, a debtor only intends to negotiate with a small group of creditors (for instance, financial creditors/banks) but not trade creditors, for the purpose of keeping its business operating, instead of adopting a 'wholesale' restructuring.[61] The debtor may therefore only enter into agreements with some creditors such as financial creditors but not all. What is the position of 'unaffected' creditors? When adopting restructuring plans, '[p]arties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan'.[62] That leaves the question unanswered whether these (unaffected) parties nevertheless can get access to (a) the same information as will be provided to the 'affected' creditors, and can get access to (b)

[59] Article 369(6) DBA. In October 2021 91 'WHOA' cases have been decided, both 'public' and 'private' cases. The number of public cases in 'very limited', see F. Damsteegt-Molier, 'De besloten WHOA-procedure - geen geheime procedure', *Tijdschrift voor Insolventierecht (TvI)* 2021/47, who reports that from these 91 cases 49 have been published on the Dutch court cases website (www.rechtspraak.nl), which is against the general Dutch judicial best practice of 'publication, unless circumstances mandate otherwise'.

[60] Article 369(8) DBA.

[61] Dennis J. Connolly, 'Current Issues Involving Prepackaged and Prenegotiated Plans' Norton Annual Survey Bankruptcy Law, Vol. 2004, 2004, p. 2; Horst Eidenmüller, Comparative Corporate Insolvency Law, In: Jeffery N. Gordon, Wolf-Georg Ringe (eds) *The Oxford Handbook of Corporate Law and Governance*, Oxford: Oxford University Press, 2018, p. 1003-1036.

[62] Article 9(2) EU Restructuring Directive.

information about the commencement of a preventive restructuring process or the content of a restructuring plan.

As to question (a) the following is noted. Article 15(1) of the EU Restructuring Directive provides that EU Member States shall ensure that restructuring plans that are confirmed by a judicial or administrative authority are binding upon all affected parties. The position of 'unaffected' parties follows from Article 15(2), which provides that EU Member States shall ensure 'that creditors that are not involved in the adoption of a restructuring plan under national law are not affected by the plan'. As Recital 64 explains, the Directive's purpose is that the binding effects of a restructuring plan are limited to the group of affected parties that were involved in the adoption of the plan. It is to be decided by EU Member States '… to determine what it means for a creditor to be involved, including in the case of unknown creditors or creditors of future claims'.[63] Although there may be uncertainty as to which claims will be affected by the plan, there is no provision with regard to unaffected parties. There is no indication that a debtor's general duty to disclose information in preventive restructuring proceedings includes this duty to exist towards unaffected parties.

This second question (b) is related to the commencement of a preventive restructuring proceeding as well as approval of a restructuring plan by a judicial or administrative authority.[64] As explained in the previous section, a preventive restructuring proceeding enjoys the privilege as being confidential or private, hence there is no need to disclosure such information to unaffected creditors. When deciding whether to confirm a restructuring plan, a judicial or administrative authority only need to consider whether "notification of the restructuring plan has been given in accordance with national law to all affected parties".[65] This condition indicates that it is not necessary to send a notification to unaffected parties. Evidently, there will be a public registration/publication of the confirmation judgment.

However, this situation as mentioned under (b) does not preclude the possibility to notify unaffected creditors where national law so mandates. Under certain circumstances, parties (creditors) may sign a confidentiality agreement to protect sensitive information if they wish to obtain information about the debtor, the process or the plan.[66] Such information may be included in court dockets but should not be made available to the public. Concerns have been raised about the enforceability of such confidentiality agreements, e,g. penalties or exceptions.[67] This report does not address this issue in detail; it is up to each Member State's own laws.

Recommendation 4

4.1 A debtor's general duty to disclose information in preventive restructuring proceedings does not address unaffected parties.

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[63] As an example, Recital 64 EU Restructuring Directive mentions that EU Member States should be able to decide how to deal with creditors that have been notified correctly but that did not participate in the procedures.

[64] Article 10 EU Restructuring Directive. See Lorenzo Stanghellini, Riz Mokal, Christoph G. Paulus and Ignacio Tirado (eds) *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law*, Milano: Walters Kluwer Italia, 2018, available at http://www.codire.eu/publications/.

[65] Article 10(2)(c) EU Restructuring Directive.

[66] It is a common practice in normal insolvency proceedings. See Wessels and Guo, 2020, p. 79-80; D. A. Zazove, 'Confidentiality Issues Arising Under Section 363 of the Bankruptcy Code', *Business Law Today*, August 2015, p. 1-4.

[67] Carol M. Bast, 'At What Prices Silence: Are Confidentiality Agreements Enforceable', *William Mitchell Law Review*, Vol. 25, No. 2, p. 627-714.

4.2 A notification of the approval or confirmation of a restructuring plan by a judicial or administrative authority is given when national law so provides. This requirement does not preclude the possibility to have certain information disclosed by the debtor prior to such approval or confirmation to be provided to unaffected creditors in case national law so provides.

6 CROSS-BORDER ISSUES

6.1 Applicable law

6.1.1 European Insolvency Regulation

In the EU, cross-border insolvency is regulated under the European Insolvency Regulation (recast) (EIR 2015). However, the EIR 2015 does not specifically address confidentiality, secrecy or privilege matters, nor does the EU Restructuring Directive prescribe cross-border issues. EU Restructuring Directive does however clearly state that the '[EIR 2015] covers preventive procedures which promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons'.[68] This demonstrates the intention of the EU legislator to include preventive restructuring proceedings within the scope of the EIR 2015.

The first premise is whether the EIR 2015 applies to preventive restructuring proceedings. This issue will be extensively studied by Working Party 11 ('Matters regarding the European Insolvency Regulation 2015 (EIR 2015)'). Simply put, according to the EIR 2015, insolvency proceedings refer only to collective insolvency proceedings listed in Annex A, but – given its literal wording – it does not include preventive restructuring proceedings, but does not exclude them either.[69] It is therefore the question which characteristics any preventive restructuring, having been implemented as a result of EU Restructuring Directive, need to have, to be able to enjoy the benefits of being listed in Annex A (and with that could be recognised automatically in all EU Member States of the EU, except for Denmark).

Based on the assumption that the EIR 2015 applies to cross-border preventive restructuring proceedings, the question would be which jurisdiction's law applies to an attorney-client privilege.[70] Following Article 7(1) of the EIR 2015, the *lex fori concursus* (including its rules on private international law) applies. This provision prescribes that '[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened'.[71] The exceptional provisions only regulate third parties' right *in rem*, set-off, reservation of title, contracts relating to immoveable property, payment systems and financial markets, contracts of employment, effects on rights subject to registration, European patents within unitary effect and Community trade marks, detrimental acts, protection of third party-purchasers, effects of insolvency proceedings on pending lawsuits

[68] Recital (12) EU Restructuring Directive.

[69] Article 2(4) and Annex A EIR 2015. See Bob Wessels, *International Insolvency Law Part II: European Insolvency Law*, 4th edn, Deventer: Wolters Kluwer, 2017, paras 10425u, 10511a-10511b.

[70] The Working Party recognises that in certain countries an attorney's client can waive the privilege, in others this is not the case. The text of the Report focuses on a privilege that cannot be waived.

[71] Article 7(1) EIR 2015.

or arbitral proceedings.[72] These exceptions do, however, not relate to confidentiality, secrecy and privilege.

For the topic of attorney-client privilege the English case *Re Hellas Telecommunications (Luxembourg) II SCA* is relevant.[73] In this case, the debtor's COMI was in the UK (prior to Brexit), and liquidators were appointed to seek orders for production of documents, including some that belonged to a firm of Luxembourg lawyers, NautaDutilh. Those Luxembourg lawyers refused to disclose information to the English liquidators based on Luxembourg professional secrecy rules. The court was faced with the question of which law should apply in a cross-border insolvency setting: the law governing the privilege – Luxembourg law – or the law of the main insolvency proceedings – English law? The court held that English law should apply, that is, the law of the place where the main insolvency proceedings had been opened.[74] Therefore, the English liquidators had powers to access documents of Luxembourg lawyers, unless a Luxembourg court would refuse to recognise and enforce English judgments based on the public policy exception provision in the EIR[75] or would be refused based of the rules of Brussels I.[76] However, this outcome has been questioned by the Working Party as it is unreasonable for a Luxembourg lawyer to bear a duty under English laws, since the Luxembourg lawyer is not allowed to practice in the UK respectively it has to bear the consequences of such a duty and provide documents or information the addressed lawyer itself, under its laws, is not allowed to share with others. As a provisional conclusion the Working Party has the view that the matter of a statutory privilege for the attorney-client relationship should be determined by the laws applicable to such a privilege.[77] As noted, the issue of attorney-client privilege will be further discussed in the next report of this Working Party.

The interest of the legal profession being protected by professional secrecy rules is a value to consider. The same is true concerning protecting by rules regarding confidentiality and secrecy the debtor is a party to. The Working Party has not found any justification not to apply the fundamental rule of the law applicable in cases determined by the EIR 2015. It is therefore inferred that matters concerning confidentiality, and secrecy fall under Article 7 and thus are subject to the law of the state of the court where the insolvency proceeding is opened.

Recommendation 5

5.1 In case the EIR 2015 applies to cross-border preventive restructuring proceedings, the law applicable with regard to matters of confidentiality and secrecy is the law of the state of the court where the insolvency proceeding is opened, ie the *lex fori concursus* (including its rules on private international law).

5.2 The EIR 2015 should be amended to clearly specify that the law applicable with regard to an attorney-client privilege shall not be the law of the state of the court where the

[72] Articles 8-18 EIR 2015.

[73] *Re Hellas Telecommunications (Luxembourg) II SCA* [2013] BPIR 756.

[74] In non-insolvency proceedings, English courts also apply the *lex fori concursus*, the law of the state of the court where a proceeding is brought (including its rules on private international law). See *Re the RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

[75] Article 26 EIR 2000.

[76] Regulation (EU) No 1215/2012. Article 32(2) EIR 2015.

[77] Under English law the question whether a document is capable of being privileged is a question to be determined as a matter of English conflicts law by the *lex fori*. See Lawrence v. Campbell (1859) 28 L. J. Ch. 780. This approach has been consistently followed since then, see recently Suppipat & Ors v Siam Commercial Bank Public Company Ltd & Ors [2022] EWHC 381 (Comm) (02 March 2022). In this case the *lex fori* was English law.

insolvency proceeding is opened, rather it should be solely the law of the Member State applicable to that privilege.

6.1.2 Rome I Regulation

Confidentiality or secrecy could be the result of an agreement (an independent confidentiality agreement) or a specific clause included in the restructuring proposal to which a group of creditors/stakeholders is asked to agree with. In such a case the Rome I Regulation[78] may play a role. Rome I Regulation applies, 'in situations involving a conflict of laws, to contractual obligations in civil and commercial matters'.[79] There cannot be any doubt that confidentiality/secrecy is discussed in this report is a civil and/or a commercial matters. However, the Rome I Regulation excludes ten topics from its scope.[80] One of the exclusions concerns 'questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body' (Article 1(2)(f) Rome I Regulation).

The question of whether the Rome I Regulation can apply to preventive restructuring proceedings will be more closely studied in another CERIL project by Working Party 11. Simply put, there are two opposite positions towards this issue. One argument could be that preventive restructuring proceedings are excluded from the scope of Rome I since such proceedings are related to corporate law matters. The rather narrow interpretation given by

[78] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6.

[79] Article 1(1) Rome I Regulation.

[80] Article 1(2) Rome I Regulation provides that the following shall be excluded from the scope of the Regulation:
"(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
(b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
(e) arbitration agreements and agreements on the choice of court;
(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(i) obligations arising out of dealings prior to the conclusion of a contract;
(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (14) the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work."

the CJEU seems to support this argument.[81] On the other hand, in parallel to schemes of arrangements, propositions have also been made that in preventive restructuring proceedings debtors and creditors reach contractual arrangements amending previous contractual relationships, especially when the plan only alters contractual arrangements between a debtor and its creditors but not its shareholders or investors;[82] Therefore, such contractual arrangements fall under the scope of Rome I Regulation.

In terms of confidentiality, secrecy and privilege matters, if a separate and independent confidentiality agreement is signed between the information holder (the debtor) and the information requester (creditors or third parties), the agreement should be deemed as a contract and, consequently, would be subject to Rome I. The agreement does not affect others not being parties to the agreement. However, the situation may be more complex if no separate agreement is signed, and the confidentiality, secrecy and privilege matters are intertwined with the whole preventive restructuring proceedings and/or restructuring plans. The determination of the applicable law needs to revert back to the precondition question of whether the Rome I Regulation can apply to preventive restructuring proceedings.

Even if preventive restructuring plans as such can be categorised as contract law matters within the scope of Rome I Regulation, the question then rises: which law applies? A basic principle under Rome I is freedom of contract or party autonomy, where parties may choose the applicable law of a contract.[83] When a choice of law provision is missing in the restructuring plan, the applicable law then may be the 'the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence',[84] or the law of the country with which the restructuring plan is most closely connected.[85]

However, a contradictory view may be raised when (cross-class) cramdown is applied, where a plan is reached by statutory rules rather than full agreement among all affected parties. In such a case, Rome I cannot apply.[86]

The examples presented shortly above lead to the conclusion that the application of the Rome I Regulation in preventive restructuring proceedings may encounter difficulties and uncertainties, and this Working Party recommends that future legislative clarification is needed. Rome I is different from EIR 2015 in that it usually does not apply to ongoing

[81] In CJEU 7 April 2016, Case C-483/14 (*KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group*) reference was made to the Report on the Convention on the law applicable to contractual obligations by professors Giuliano and Lagarde (OJ 1980 C 282, p. 1), that questions governed by the law of companies or other bodies corporate or unincorporated were not included within the scope of the Rome Convention in view of the work being conducted on the subject of company law within the European Communities: 'It is also clear from the report that contracts governing the winding-up of companies, such as mergers or groupings of companies, are listed among those covered by the exceptions set in Article 1(2) of the Rome Convention. The Convention does not therefore apply to the merger of companies.' See also the English case *Re Gatagroup Guarantee Ltd* [2021] EWHC 304 (Ch), in which the court categorised preventive restructuring proceedings as insolvency proceedings.

[82] See, e.g., Arthur Swierczok, 'Recognition of English solvent Schemes of Arrangement in Germany', *The King's Student Law Review*, Vol. 5. No. 1, 2014, p. 78-91. *Cf.* Brenda Hannigan, *Company Law*, 2nd edn, Oxford: Oxford University Press, 2009, paras 26–101 (arguing the Rome I cannot apply because schemes/restructuring proceedings are not private contractual matters but statutory procedures).

[83] Article 3(1) Rome I Regulation.

[84] Article 4(2) Rome I Regulation.

[85] Article 4(3) and (4) Rome I Regulation.

[86] Lucas Kortmann and Michael Veder, 'The Uneasy Case for Schemes of Arrangement under English law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?', *Nottingham Insolvency and Business Law e-Journal*, Vol.3, 2015, 239–161,224 (arguing the Rome I cannot apply because dissenting creditors are bound by schemes/restructuring plans).

proceedings with multiple parties. It is therefore recommended that the Rome I Regulation in the near future considers its position with regard to specific arrangements dealing with insolvency-like preventive restructuring proceedings.

Recommendation 6

6 Rome I may apply in preventive restructuring proceedings, provided restructuring plans are considered as contracts. Yet, it is recommended that legislators formulate more explicit rules on this matter.

6.2 Cooperation and coordination

Cooperation and coordination between courts and insolvency practitioners are promoted in the EU. In 2012, the American Law Institute ('ALI') and the International Insolvency Institute ('III') published its ALI-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines ('Global Principles and Guidelines').[87] These ALI-III Global Principles and Guidelines 2012 subsequently formed a solid basis for a set of tailored principles, published in 2015, for use under the regime of the EIR 2015, which apply to insolvency proceedings opened in the European Union as of 26 June 2017. They are named EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (also known as the EU JudgeCo Principles and Guidelines).[88] As to the matter of cooperation between courts, especially those with a common law background, in 2017 the Judicial Insolvency Network (JIN) was established. It also published the JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters and in 2019 the Modalities of Court-to-Court Communication.[89] All three sets of principles and guidelines reflect best practice, resulting in their non-binding character. The JIN Guidelines are approved for use by some ten courts, all located outside the EU.[90]

In these international models, confidentiality is also a major concern, for example, Principle 8(c) of the ALI-III Global Principle and Guidelines, Guideline 8(iii) of the EU JudgeCo Principles and Guidelines, Guideline 8(iii) of the JIN Guidelines.[91] Similarly, the EIR 2015 itself specifies that cooperation and coordination in cross-border insolvency proceedings should obey the requirement of confidentiality, especially when insolvency practitioners and courts exchange information.[92] Therefore, communication cannot take place when other confidentiality duties may be violated, for example, the legal protection of trade secrets.[93] Sharing information should also be justifiably restricted in reorganisation proceedings 'where its

[87] ALI and III, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' (2012), available at www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf. In August 2017, III re-posted the ALI-III Global Principles for Cooperation in International Insolvency Cases 2012 on its website available at www.iiiglobal.org.

[88] Information can be accessed at Leiden University, 'EU JudgeCo Platform', available at www.universiteitleiden.nl/en/research/research-projects/law/eu-judgeco-platform.

[89] Information can be accessed at JIN website available at www.jin-global.org.

[90] As an example, in its amendment of May 2017 to the Chancery Guide, for England & Wales, the Chancery Division (one of the three Divisions of the High Court of Justice) refers to the three sets.

[91] Wessels and Guo, 2020, p. 66-67.

[92] Articles 41(2)(a), 42(2), 56(2)(a), and 57(2) EIR 2015.

[93] Daniele Vattermoli et al. (eds) *Transnational Protocols: A Cooperative Tool for Managing Cross-border Insolvency*, Milan: Wolter Kluwer Italia, 2021, p. 115.

continued ability to operate in the market and the protection of value may require confidentiality'.[94]

Usually, sharing non-public (e.g. commercially sensitive) information should be subject to confidentiality arrangements.[95] In cross-border (group) insolvency, protocols are often used to address cooperation issues.[96] In these protocols, a confidentiality clause is a common standard clause.[97] In 2021 a multi-jurisdiction European Commission-funded research project on cross-border insolvency, a European Model Protocol was proposed, with confidentiality requirements on information sharing between different jurisdictions.[98] However, not all cooperation and communication protocols approved by courts have incorporated the duty of confidentiality. For example, the Mosaic Protocol from 2003 only states that "Canadian Court and the U.S. Court may communicate with one another with respect to any matter relating to the Insolvency Proceeding".[99] It is not clear how a breach of the duty of confidentiality would affect the protocol or communication/information sharing, yet it should be acknowledged that national laws on confidentiality should be obeyed.

In cross-border preventive restructuring proceedings, there may also be cooperation between courts, practitioners, or between courts and practitioners, who need to share information with each other. In such processes, confidentiality should be a consideration when deciding about such cooperation. The situation in case of a debtor in possession this consideration may be simpler, because the debtor continues its daily business and thus can coordinate its restructuring in different jurisdictions. However, in cases where foreign courts or IPs are involved, the debtor in possession also need to comply with confidentiality requirements.

Recommendation 7

7 Confidentiality arrangements should be in place to protect sensitive and non-public information when cooperation and coordination happen in cross-border preventive restructuring proceedings.

7 CONCLUDING REMARKS

This report is the first one of WP 13's project on confidentiality, secrecy and privilege matters in relation to the EU Restructuring Directive. It focuses on the debtor's angle and analyses several issues: debtors' duty of disclosure and exceptions, disclosure and confidentiality of preventive restructuring proceedings, disclosure and non-affected parties, applicable law in cross-border cases and international cooperation and coordination.

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[94] UNCITRAL Legislative Guide, Chapter III, para.30

[95] Kokorin and Wessels, 2021, p. 121.

[96] *Ibid.* See also Ilya Kokorin and Bob Wessels, *Cross-border Protocols in Insolvencies of Multinational Enterprises Groups*, Cheltenham: Edward Elgar, 2021.

[97] E.g. the European Model Protocol, Article 15(5), see Vattermoli et al., 2021, p. 153 (fn 16) and p. 441. See also Kokorin and Wessels, 2021, p. 215-126 (Commodore Protocol), p .221 (Everfresh Protocol), p. 250 and 256 (Inverworld Protocol), p. 282, 283 and 285 (Lehman Brothers Protocol), p. 295 (Madoff Protocol).

[98] Article 15(3) and (5) European Model Protocol, available at https://stephanmadaus.de/wp-content/uploads/2021/06/European-Model-Protocol-with-guide-to-implementation-2021-ebook-English.pdf.

[99] Mosaic Protocol, para. 11(b).

In this report, CERIL recognises the significance of both the need to disclose information to affected parties, and to enable that certain information can be kept confidential. CERIL points out that keeping some preventive restructuring proceedings confidential or private also involves limited disclosure of information, however, this may serve the purpose of achieving better restructuring results. Yet, CERIL also identified the need to impose the duty of disclosure on debtors, which should be geared to ensuring that affected parties are able to make an informed judgment of a preventive restructuring plan.

Based on these premises, CERIL has adopted the following recommendations to EU Member States to take into account when formulating their preventive restructuring laws:

Recommendation 1

1.1 Subject to Recommendation 2 (confidentiality) and Recommendations 3 and 4 (affected and non-affected creditors) a debtor should be required to bear a general duty to disclose information to creditors in preventive restructuring proceedings.

1.2 The purpose of the duty to disclose is to make available all facts relevant to the assessment of a preventive restructuring request as well as a preventive restructuring plan, to allow anyone addressed (such as a court or creditors) to make an informed judgment.

1.3 The duty to disclose concerns the provision of information that the debtor knows or should understand to be important for the effective implementation of any preventive restructuring at issue.

1.4 The duty to disclose rests on the debtor itself and is realised on the debtor's own initiative. Within the specifics of a Member State's available restructuring proceedings, the duty to disclose includes the duty to actively keep the information up to date during the full process, including the process towards an approved and confirmed preventive restructuring plan.

1.5 Not complying with the duty to disclose by the debtor will generally result in the creditors' voting against a proposed plan and/or a court withholding its confirmation of the plan and/or any specific sanctions in a national insolvency law or criminal law. EU Member States should enact or amend an appropriate sanction-system in their laws.

Recommendation 2

2.1 In making available all facts relevant to the assessment of a preventive restructuring request, under certain circumstances, a debtor should be allowed to keep certain information confidential.

2.2 EU Member States should enact or amend an appropriate system for ensuring that certain information should remain confidential. Such a system could include 'sealing' of information.

2.3 EU Member States should lay down explicitly in their laws an option to submit any controversies whether certain information is confidential to a court to allow it to decide whether certain information should be disclosed.

2.4 To ensure swift and efficient proceedings, an appeal to (higher) courts against the court's decision should not have an automatic suspension effect on preventive restructuring proceedings.

Recommendation 3

3 Preventive restructuring proceedings may be kept confidential (or: 'private') between a debtor and its creditors. In compliance with Recommendation 1 such a debtor will still be

required to bear a general duty to disclose information to affected creditors in such preventive restructuring proceedings.

Recommendation 4

4.1 A debtor's general duty to disclose information in preventive restructuring proceedings does not address unaffected parties.

4.2 A notification of the approval or confirmation of a restructuring plan by a judicial or administrative authority is given when national law so provides. This requirement does not preclude the possibility to have certain information disclosed by the debtor prior to such approval or confirmation to be provided to unaffected creditors in case national law so provides.

Recommendation 5

5.1 In case the EIR 2015 applies to cross-border preventive restructuring proceedings, the law applicable with regard to matters of confidentiality and secrecy is the law of the state of the court where the insolvency proceeding is opened, ie the *lex fori concursus* (including its rules on private international law).

5.2 The EIR 2015 should be amended to clearly specify that the law applicable with regard to an attorney-client privilege shall not be the law of the state of the court where the insolvency proceeding is opened, rather it should be solely the law of the Member State applicable to that privilege.

Recommendation 6

6 Rome I may apply in preventive restructuring proceedings, provided restructuring plans are considered as contracts. Yet, it is recommended that legislators formulate more explicit rules on this matter.

Recommendation 7

7 Confidentiality arrangements should be in place to protect sensitive and non-public information when cooperation and coordination happen in cross-border preventive restructuring proceedings.

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